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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Appeal from the Supreme Court of Ohio.

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

JURISDICTIONAL STATEMENT

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THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Ohio, entered January 30, 1957, reversing in part and affirming in part the Board of Tax Appeals of Ohio. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

I

REFERENCE TO OPINIONS BELOW

The opinion of the Board of Tax Appeals of Ohio was entered April 30, 1956, being Case No. 28439 on the board's docket (unreported, see Appendix II).

The opinion of the Supreme Court of Ohio was entered January 30, 1957, *Youngstown Sheet and Tube Co. v. Bowers*, 166 Ohio St. 122, 140 N. E. 2d 313 (see Appendix III). Rehearing denied, February 20, 1957.

II

STATEMENT OF GROUNDS OF JURISDICTION

Proceedings leading to this appeal began when the Tax Commissioner of Ohio issued preliminary assessment certificates covering appellant Youngstown Sheet and Tube Company's storage merchandise and stocks of imported iron ores for tax year 1954. The commissioner affirmed the assessments on March 2, 1955. (See Appendix I.)

Appellant then appealed to the Board of Tax Appeals of Ohio, and on April 30, 1956, the board journalized its decision holding that Sections 5709.01, 5711.01, and 5711.03, Revised Code of Ohio, could not constitutionally tax appellant's imported iron ores, and further, that it had no jurisdiction to declare Section 5701.08, Revised Code of Ohio, unconstitutional as denying equal protection of the laws, thus affirming the tax against the storage merchandise. (Decision unreported, see Appendix II.)

Subsequently, within time, appellant appealed the equal protection side of the case, and the Tax Commissioner appealed the imports side, to the Supreme Court of Ohio.

The court reversed the board on the imports question and affirmed it on the equal protection question, which is to say, it held both the imports and storage merchandise subject to tax, *Youngstown Sheet and Tube Co. v. Bowers,* 166 Ohio St. 122, 140 N. E. 2d 313, decided January 30, 1957, and journalized by entry on the same date (see Appendix III). Application for rehearing was denied February 20, 1957, and the denial journalized by entry on the same date.

From the above judgment, notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio, on April 30, 1957.

III

STATUTES AND CASES

This is an appeal taken pursuant to 28 U.S.C.A., Section 1275 (2), and the cases believed to sustain the court's jurisdiction are *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106; *Zucht v. King,* 260 U.S. 174, 67 L. Ed. 195, 43 S. Ct. 24; *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311, 47 L. Ed. 190, 23 S. Ct. 123; *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 73 L. Ed. 184, 49 S. Ct. 61; *Braniff Airways v. Nebraska,* 347 U.S. 590, 98 L. Ed. 967, 74 S. Ct. 757; *Charleston Federal Savings and Loan Association v. Alderson,* 324 U.S. 182, 185-6 n. 1, 89 L. Ed. 857, 65 S. Ct. 624; *Enterprise Irrigation District v. Farmers' Mutual Canal Co.,* 243 U.S. 157, 164, 61 L. Ed. 644, 37 S. Ct. 318; *Ward v. Board of County Commissioners,* 253 U.S. 17, 22, 64 L. Ed. 751, 40 S. Ct. 419; *West Chicago Street R. Co. v. Illinois,* 201 U.S. 506, 50 L. Ed. 845, 26 S. Ct. 518; *Steele v. Louisville & Nashville R. R. Co.,* 323 U.S. 192, 89 L. Ed. 173, 65 S. Ct. 226; *Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464, 475-6, 62 L. Ed. 1215, 38 S. Ct. 566; *Lawrence*

v. State Tax Commissioner, 286 U.S. 276, 282, 76 L. Ed. 1102, 52 S. Ct. 556; *International Steel & Iron Co. v. National Surety Co.*, 297 U.S. 657, 662, 80 L. Ed. 961, 56 S. Ct. 619.

The principal statute pertaining to the imports issue is Section 5709.01, Revised Code of Ohio, (Title 57, *Page's Ohio Revised Code Annotated*, page 78; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 40), providing in material part:

> "All real property in this state is subject to taxation, except only such as is expressly exempt therefrom. *All personal property located and used in business in this state*, and all domestic animals kept in this state, whether or not used in business, *are subject to taxation*, regardless of the residence of the owners thereof." (Emphasis added)

Appendix IV sets forth verbatim the above section and Sections 5711.01 and 5711.03, Revised Code of Ohio.

The principal statute pertaining to the equal protection issue is Section 5701.08, Revised Code of Ohio, (Title 57, *Page's Ohio Revised Code Annotated*, page 13; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 5,), which provides:

> "As used in Title 57 of the Revised Code:
>
> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation whether actually in operation or not, *or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only.* • • •
>
> "(B) 'Business' includes all enterprises conducted for gain, profit, or income and extends to personal service occupations." (Emphasis added)

For the above section verbatim see Appendix IV.

IV

QUESTIONS PRESENTED

This appeal presents the following questions:

First, may a state statute constitutionally impose a property tax upon bulk iron ores which have been imported from foreign countries and which are being stored in the same form as imported, not co-mingled with other property of the taxpayer and not yet used or about to be used by the taxpayer?

Second, does a statute deny residents of the state equal protection of laws under the Constitution of the United States by imposing a property tax upon the residents' storage merchandise held for storage only, while at the same time excepting the storage merchandise of nonresidents when held for storage only?

V

STATEMENT OF CASE

A. Material Facts

The facts have been stipulated (see Appendix V).

First the imports: During the year 1953 Youngstown Sheet and Tube imported iron ores in bulk from various foreign countries, Brazil, Cuba, Mexico, Liberia and Canada. The ores were kept in storage in the company's storage yards at a considerable distance from its factory.

Each shipment of Brazilian, Cuban, Mexican and Liberian ore was transported by ocean vessel to Baltimore or Philadelphia, the ports of entry; and there loaded into railroad cars and immediately shipped on to Youngstown, Ohio. Upon arrival at Youngstown the ores were unloaded at the

storage yards and placed in a separate storage pile in a separate area apart from any other property.

Each shipment of the Canadian (Seine River) ore was transported by lake vessel to Cleveland, Ohio, the port of entry, and there was loaded into railroad cars and immediately shipped on to Youngstown, where the cars were unloaded at appellant's storage yards, and the ore placed in a separate storage pile in a separate area of the yards, apart from any other property.

There was no co-mingling of the ores, excepting limited facilities required shipments of identical ore be put on top of each other (i.e. Brazilian on Brazilian, Cuban on Cuban, Mexican on Mexican, Liberian on Liberian and Canadian on Canadian). All ores were stored in the same form as imported.

Passing now to appellant's storage merchandise which it claims was unequally taxed, this consisted of domestic iron ore stored in concrete ore bins on the Lake Erie public docks at Ashtabula, Ohio and Bedford, Ohio, raw materials stored in Trumbull and Mahoning counties, and finished seamless pipe stored in pipe storage yard in Mahoning county.

The stipulation of facts is set forth in Appendix V.

B. Stage at Which the Federal Questions Was Raised

Appellant first raised its constitutional objections at the Tax Commissioner's hearing. (See the Tax Commissioner's entry, Appendix I.)

In its notice of appeal to the Ohio Board of Tax Appeals, appellant once more interposed its constitutional objections by assignment of errors:

> "2. Appellee erred in including, as taxable, iron ores imported by appellant from foreign countries,

which ores are immune from state taxation under the provisions of Article I, Clause 10, of the Constitution of the United States.

"3. Appellee erred in including as taxable, merchandise belonging to appellant and held for storage only in this state for the reason that like property belonging to a nonresident is excepted from taxation by Section 5701.08 of the Revised Code, and same section (and related sections), purporting to levy a tax on merchandise belonging to residents of this state and held for storage only, is, therefore, unconstitutional and void in that it denies appellant the equal protection of the law to which appellant is entitled under the Constitution of the State of Ohio and the Constitution of the United States."

The constitutionality of Section 5701.08, Revised Code of Ohio, was thereby challenged, and the board expressly recognized Sections 5709.01, 5711.01 and 5711.03, Revised Code of Ohio, as the sections taxing the imports. We quote from its opinion:

"These Code provisions appear to be the only sections thereof that could possibly be in conflict with the federal constitutional provision."

Under Ohio law, neither the Tax Commissioner nor the Board of Tax Appeals has jurisdiction over constitutional questions (See the commissioner's and board's opinions, Appendix I and Appendix II), although either may construe a statute so as to avoid unconstitutionality. This the board did on the imports by holding that the relevant sections could not tax them.

Thus, the taxpayer's first effective opportunity was before the Ohio Supreme Court, *Yakus v. United States* 321 U.S. 414, 444, 88 L. Ed. 834, 64 S. Ct. 660.

Inasmuch as it prevailed before the board on the imports question, its appeal to the court could only be of the

equal protection side. This was done explicitly by the first assignment of error in its notice of appeal:

> "1. Section 5701.08, Revised Code, under which inventories held by Appellant for storage only were assessed by the Tax Commissioner, denies Appellant equal protection of the laws is therefore unconstitutional."

Similar error was assigned in *Allied Stores of Ohio, Inc., v. Bowers*, 166 Ohio St. 116, 140 N. E. 2d 411, companion to the present case, and the court having decided *Allied Stores* first, simply applied its holding to this case and sustained the constitutionality of the statute.

Motion was duly filed with the Ohio Supreme Court to certify its holding, and make such certification a part of its judgment. We quote from the journalized statement:

> "On motion of the appellant, Youngstown Sheet and Tube Co., it is ordered to be certified and made a part of the record of the proceeding and of the judgment of the Court in the cause that by its appeal from the Board of Tax Appeals, the appellant placed in issue the constitutionality of former Section 5701.08, Revised Code of Ohio, contending that the said Section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations while excepting the same property of non-resident corporations, and that the Court found, pursuant to appeal, briefs and oral argument of counsel, (and by its decision in Allied Stores of Ohio, Inc., v. Bowers, 166 OS 116) that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the Section to include Appellant within the exception; that therefore the Section must stand; that so standing and so construed the Section was not repugnant to the United States Constitution or if repugnant, had never-

theless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the Court's decision."

The imports question was appealed by the Tax Commissioner who assigned the following errors:

"1. The Board of Tax Appeals erred in finding that imported ores included within the average monthly inventory base as a basis for an assessed tangible personal property assessment order entered by the Tax Commissioner for the year 1954, should not have been included therein.

"2. The decision of the Board of Tax Appeals is unreasonable and unlawful as to the reversal of the order of the Tax Commissioner with respect to the inclusion of certain imported ores within the average monthly inventory for the purpose of the assessment of tangible personal property tax for the year 1954."

The board's decision in turn was based on Article I, Section 10, Clause 2 of the Constitution and Sections 5709.01, 5711.01, and 5711.03, Ohio Revised Code, that those sections could not constitutionally tax appellant's iron ores because they were imports. Consequently, the issue before the Ohio Supreme Court had to be whether Sections 5709.01, 5711.01 and 5711.03, Revised Code of Ohio, were in conflict with Article I of the Constitution. The Supreme Court held that they were not and were constitutional.

Again the Ohio Supreme Court was requested to certify and make a part of its judgment the grounds of its holding, and we quote from the journal:

"* * * The Tax Commissioner, by his appeal to this court from the Board of Tax Appeals of Ohio, placed in issue the constitutionality of Section 5711.03, 5701.08, 5709.01 and 5711.01 of the Ohio Revised Code, as to whether appellant's iron ore imports were tax-

able under those Sections, or protected therefrom by Article I, Section 10, Clause 2 of the United States Constitution as imports; that this court, pursuant to appeal, and upon the record, briefs of counsel, and oral argument, reversed the Board of Tax Appeals of Ohio, which had held that appellant's iron ore imports were protected from the application of the above Sections, and in turn held that the Sections did tax appellant's iron ore imports; that upon consideration of the same, the court was of the opinion and accordingly decided, that the said Statutes were not invalid by reason of taxing appellant's iron ore imports and were not repugnant to the United States Constitution in so taxing; and that a determination of that question was appropriate and necessary to a decision in this case."

The certificates are attached under Appendix VI:

From the preceding discussion, appellant concludes that the constitutional questions involved in both phases of this case, imports and equal protection, were appropriately raised, and that the Ohio Supreme Court passed upon and upheld the constitutionality of the pertinent Ohio statutes.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. Imports

The questions presented by this appeal are both substantial and unique. So far as concerns the imports, counsel has found no United States Supreme Court decision holding directly on bulk imports, whether they have the same protection as packaged goods, or assuming they have, what test is to be applied.

Such decisions as are, however, lend support to the Ohio Board of Tax Appeals' analysis, rather than the Ohio Supreme Court's. The Board held bulk fungibles were non-taxable as much as were packaged imports, and the

test to be employed should be comparable in practice to the original package doctrine. Hence, concluded the board, while the iron ores were kept in storage in the same form as imported, they remained imports, but those amounts removed from storage and taken to stock bins and stock houses for day to day use were appropriated to the purpose for which they had been imported and ceased to be imports. The Ohio Supreme Court swept aside this analysis and ruled that each entire shipment of ore was a "package"; that the removal of any amount "broke the package"; and that not only was the ore in each shipment subject to tax, but also every new shipment placed on top of it. The court's syllabus holds:

> "1. If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, such protection cannot extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place and (2) after portions of such iron ore have been removed for use in manufacturing."

This holding is not consistent with decisions of this Court, or decisions of state courts treating the subject of fungible imports. The test set down by Chief Justice Marshall in *Brown, et al. v. The State of Maryland*, 12 Wheat. 419, 6 L. Ed. 678, was not restricted to packaged goods, as shown by his opinion on pages 441 and 442:

> "It is sufficient for the present to say, generally, that when the importer has *so acted* upon the thing imported hat it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the

state; but while remaining the property of the importer, in his warehouse, in the *original form* or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." (Emphasis added)

Chief Justice Taney iterated the rule in the *License Cases,* 5 How. 504, 12 L. Ed. 256 quoted with approval in *Low v. Austin,* 13 Wall. 29, 20 L. Ed. 517, on page 34.

"'Indeed, goods imported, while they remain in the hands of the importer, in the *form and shape* in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State Government.'" (Emphasis added)

A later case is *East Ohio Gas Co. v. Tax Commission of Ohio, et al.,* 283 U. S. 465, 75 L. Ed. 1171 51 S. Ct. 499. Reasoning from the analogy of an original package, the court held that natural gas in transportation pipes was in interstate commerce, albeit such quantities as were actually moved into distribution lines for day to day use, had been broken from the "original package" and thereupon ceased to be an object of commerce. This, of course, was the approach taken by The Ohio Board of Tax Appeals.

And see also *Sonneborn Brothers v. Keeling,* 262 U. S. 506, 67 L. Ed. 1095, 43 S. Ct. 643; *State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc.,* 284 U. S. 41, 76 L. Ed. 156, 52 S. Ct. 62; but compare *Gulf Fisheries v. MacInerney,* 276 U. S. 124, 72 L. Ed., 495, 48 S. Ct. 227.

A still more recent case is *The Hooven & Allison Co. v. Evatt,* 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct., 870, which also involved fungibles i.e. bales of hemp and rope fibre. The Court again held that they were imports until used for the purpose or subjected to the manufacture for which they had been imported.

Ohio taxpayers assumed that *Hooven & Allison* put to rest the taxability of imports, fungible as well as packaged, but apparently not. The Ohio Tax Commissioner and the Ohio Supreme Court have reverted to their position prior to *Hooven & Allison* that every imports shipment is taxable unless kept whole and completely intact. Aside from being at odds with this Court's decisions, such a demand is impractical. No importer can preserve entire shipments separately, if for no reason other than the limitations of storage space. Furthermore, importers of packaged goods are not required to keep each shipment unbroken and separate from other shipments, why then should importers of fungibles be judged by a different, more rigorous standard?

Identical to the present is a lower court case, *Mexican Petroleum Corp. v. Louisiana Tax Commission,* 173 La. 604, 138 So. 117, which held that various grades of crude oil imported in bulk and stored in separate tanks were not taxable, and that the storage of different shipments of the same grade of oil in the same tank did not constitute commingling.

To the same effect in *Re: Taxes Pacific Guano & Fertilizer Company,* 32 Hawaii 431, holding that imported phosphate ore was not taxable so long as it remained in bulk and separate from the general mass of property. See also *West Virginia & Maryland Gas Co. v. Towers,* 134 Md. 137, 106 A. 265.

Summarizing this part of its statement, appellant submits that the questions involved are substantial and unique; that the area of law on bulk imports should be clarified in order that taxpayers and tax administrators may know with reasonable certainty the proper rule applicable; and that the rule announced by the Ohio Supreme Court is

erroneous in view of this court's decisions, and discriminatory in view of the doctrine applicable to packaged goods.

B. Equal Protection

The limits of equal protection were set in *Ohio Oil Co. v. Conway,* 281 U.S. 146, 74 L. Ed. 775, 50 S. Ct. 310, at page 160:

> "* * * The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'."

Section 5709.01, Revised Code of Ohio, taxes personal property used in business in Ohio. In defining the phrase "used in business", Section 5701.08, Revised Code of Ohio, excluded "merchandise or agricultural products belonging to a nonresident of this state" when held for "storage only".

General Cigar Co., Inc., v. Peck, 159 Ohio St. 152, 111 N. E. (2d) 265, interpreted this exception:

> "1. The exception in the definition of 'used in business' contained in Section 5325-1, General Code, (present Section 5701.08, Revised Code) that 'merchandise of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only,' is not applicable to products upon which essential steps in manufacturing or processing are carried on during the period of storage, *but is applicable where nothing is done in connection with such storage except what is necessary for the preservation of the stored merchandise or agricultural products.*" (Parenthetical matter and emphasis added)

This interpretation was approved in *The B. F. Goodrich Co. v. Peck,* 161 Ohio St. 202, 118 N. E. 2d 525. We quote the second paragraph of the court's syllabus:

> "2. Property may be held 'for storage only' even though its owner intends at some subsequent time to

sell it or to use it as manufacturing material. (*General Cigar Co., Inc. v. Peck, Tax Commr.*, 159 Ohio St., 152 followed.)"

Briefly the facts of *Goodrich* were that the taxpayer was a foreign corporation storing merchandise and raw materials in Ohio. The merchandise was for sale in the state and the raw materials were for manufacturing in the state. Appellant, Youngstown Sheet and Tube Company also stores raw materials and finished products exactly as did Goodrich. The single point of difference between *Goodrich* and the present case is residence. Goodrich being a nonresident was excepted from the same tax that residents have had to pay. However, the tax is an *ad valorem* property tax levied exclusively against personal property *used in business in Ohio.* Patently, the residence of an owner has no substantial relationship to the business use of his property in the state.

An instance of discrimination paralleling that now before the court will be found in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 93 L. Ed. 1544, 69 S. Ct. 291. There the Ohio Tax Commissioner attempted to tax accounts receivable of a foreign corporation while excepting those of a domestic. As here, the difference between taxation and exception was the taxpayer's residence. The court said on page 572 of its opinion:

> "It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction *but solely because of the different residence of the owner.*" (Emphasis added)

And see *McHenry v. Alford*, 168 U.S. 651, 666, 42 L. Ed. 614, 18 S. Ct. 242; 1 *Cooley, Taxation*, 4th Ed. 717.

Finally, a decision of this court rendered June 24, 1957, also supports appellant's contentions. The issue in *Morey*

v. Doud, — U.S. ———, 1 L. Ed. (2d) 1485, 77 S. Ct. ——, hinged upon a state statute requiring firms in the business of selling or issuing money orders to secure a license and to submit to state regulation, while at the same time excepting the American Express Company from its provisions.

The court concluded that the firms were denied equal protection of the law, saying on page 1492 of the Law Edition report:

> "Of course, distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences'."

Residence of an owner is not a genuinely different characteristic of his business or his business property. The Ohio Supreme Court admitted as much in *The B. F. Goodrich Co., Inc., v. Peck*, 161 Ohio St. 202, 118 N. E. 2d 525, discussed above, when it commented on page 210 of its opinion:

> "There is much force to the argument of the Tax Commissioner that the decision of the Board of Tax Appeals (excepting foreign corporations from the tax) will discriminate against domestic corporations and against residents of Ohio. However, such an argument should be addressed to the General Assembly and not to this court." (Parenthetical matter added)

And in *Allied Stores of Ohio, Inc. v. Bowers*, 166 Ohio St. 116, 140 N. E. 2d 411 (see Appendix III), the holding of which was adopted as controlling for this case, the Ohio Supreme Court again recognized that the section was un-

constitutional, but nevertheless sustained it as in accordance with legislative intent. The court's syllabus holds:

> "Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitation, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

Application for rehearing was immediately filed, pointing out in paragraph fourth:

> "The single question before the court was whether in the light of the exception given to foreign corporations, residents should be accorded equal treatment by being relieved of the tax imposed upon them."

The application was denied on February 20, 1957.

Despite the presumed unconstitutionality of former Section 5701.08, Revised Code of Ohio, the court held that the section must nevertheless be sustained. Ultimately, then, the question is, can a tax properly be imposed under statutory provisions of a type which the Supreme Court of the United States has held unconstitutional and which the Ohio Supreme Court has conceded to be unconstitutional. Appellant believes that this question is substantial, particularly in view of its treatment by the Ohio court.

C. Cases Supporting Jurisdiction

The cases cited on pages 3 and 4 support the rule that this court has jurisdiction of an appeal where a constitutional question is raised at the first effective opportunity, or where it appears from the record that the question was raised. On the other hand, if the lower court decides the case on constitutional grounds or if the effect of its decision is to deny the constitutional claim, that in itself is

sufficient for jurisdiction. And, if the lower court attempts to base its decision on a supposed non-Federal ground, such ground must be adequate, not merely an effort to avoid the constitutional question.

From the lower court's opinion it might appear that the equal protection question was resolved on a nonfederal ground. In *Lawrence v. State Tax Commissioner*, 286 U.S. 276, 76 L. Ed. 1102, 52 S. Ct. 556, also involving equal protection, the Mississippi Supreme Court attempted to avoid the constitutional question by the same approach as the Ohio court, holding that if the statute were valid, the appellant could not complain, and if invalid, he would still be subject to the tax.

This court said on page 282 of its opinion:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

To resolve any possible doubt as to jurisdiction, appellant requested the Ohio Supreme Court to certify and make a part of the record and its judgment the exact ground of its decisions on both the exports and equal protection questions. The statements as certified and journalized show that this court has jurisdiction. *Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182, 186 n. 1, 89 L. Ed. 857, 65 S. Ct. 624; *International Steel & Iron Company v. National Surety Co.*, 297 U.S. 657, 662, 80 L. Ed. 961, 56 S. Ct. 619.

Appellant submits in conclusion that this court has jurisdiction of the constitutional questions; that the questions were timely raised; and that they were admittedly passed upon by the Ohio Supreme Court.

Alternatively, should the court determine that it does not have jurisdiction, certiorari should be granted.

Respectfully submitted,

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Attorney for Appellant.

APPENDIX I

Order of Tax Commissioner

(Dated March 2, 1955.)

This proceeding being the application of The Youngstown Sheet & Tube Company, an inter-county corporation, Youngstown, Ohio, for review and redetermination of an increased tangible personal property tax assessment for the year 1954, after being duly heard, came on to be considered.

The applicant herein, a domestic corporation, in making its 1954 inter-county corporation return of taxable property, eliminated from the average value of its manufacturing inventories reported therein, an amount representing the value of certain inventories of property owned by it and held in various storage facilities in this state for storage only. Upon audit, the average value of such excluded property consisting of, (a) iron ore at Lake Erie docks in Cuyahoga and Ashtabula counties, (b) iron ore, coal, scrap, limestone, fluor spar, ferros, and additions at the applicant's plant in Trumbull and Mahoning counties, and (c) finished seamless pipe at the applicant's plant in Mahoning county, was added back to the average value of manufacturing inventories as reported by the applicant. An increased assessment reflecting such action was issued for the year 1954.

The applicant filed this application for review and redetermination from such increased assessment, contending that the statutes purporting to levy a tax on merchandise held by it in storage facilities for storage only discriminate against it, and are, therefore, unconstitutional and void in that identical property, when held by a nonresident of this state for storage only, is excepted from taxation under the provisions of Section 5701.08, Revised Code, as construed in

the case of The B. F. Goodrich Co. v. Peck, 161 Ohio St., 202.

Subsequent to the issuance of the increased assessment here in issue and prior to the hearing on this application for review and redetermination, an audit was made of the applicant's books and records. As a result of such audit, certain increases were proposed in the value of applicant's property taxable in Schedules 2 and 3. The applicant's objections to such proposed increases were raised and developed at the hearing, and, in substance, are as follows:

1. To the inclusion in Schedule 2, as a part of taxable construction in progress, of an account captioned "engineering expense" which account the applicant maintains, represents fees and expenditures for the preparation and supervision of the preparation of drawings, including plans, specifications and other detail incidental thereto, and their execution, which services applicant claims are exempt from taxation under Section 5701.03, Revised Code, and Goodyear Aircraft Corporation v. Peck, 162 Ohio St., 200.
2. To the inclusion in Schedule 3 of the value of iron ores imported by the applicant from various foreign countries which ores, the applicant maintains, are immune from state taxation under the provisions of Article I, Section 10, Clause 2 of the United States Constitution.

Being fully advised in the premises, the Tax Commissioner finds that as an administrative official, he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St., 77; State ex rel. Davis v. Hildebrant, 94 Ohio St., 154, 114 N. E. 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption

of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St., 225, 28 N. E. 2d 599; Argo v. Kaiser, 66 O. L. Abs., 538, 118 N. E. 2d 162. Thus, the Tax Commissioner finds no error in the assessment here under review since the property assessed is subject to taxation under the existing provisions of Sections 5701.08, 5709.01, 5711.03, 5711.22 and correlated sections of the Revised Code.

Being further advised, the Tax Commissioner finds that the item of "engineering expense" is not exempt from taxation as personal property under the applicable statutes or the case of Goodyear Aircraft Corp. v. Peck, supra, and is, therefore, subject to taxation as a part of the value of personal property in the process of construction to which it relates.

With respect to the matter of import ores, the Tax Commissioner, being fully advised as to the facts incident to the importation and use thereof, finds that such ores have lost their identity as imports due to the fact that the import units thereof have been broken or mingled with domestic property. Thus, the Tax Commissioner finds that such ores are properly subject to state taxation. Hooven & Allison Company v. Evatt, 324 U. S. 652; 1946 O.A.G. 107.

Giving effect to the findings made herein, the Tax Commissioner finds that the true value of applicant's property taxable in Schedules 2 and 3 for the year 1954 is as follows:

Schedule	True Value
2	$44,733,598.00
3	28,800,157.00

It is, therefore, the order of the Tax Commissioner that a corrected assessment certificate be issued in accordance

with the findings made in this journal entry. Such certificate shall be final with respect to the assessment of all taxable property listed in the applicant's return.

Department of Taxation
/s/ Stanley J. Bowers
Tax Commissioner

APPENDIX II

Entry of the Board of Tax Appeals

(Dated April 30, 1956.)

This appeal is from a review and redetermination of an increased tangible personal property tax assessment covering the year 1954, made by the Tax Commissioner, against the taxpayer on March 2, 1955.

The cause now comes on for further and final consideration upon the commissioner's transcript, appellant's notice of appeal, a stipulation of facts, the record of a hearing had on August 29 last, exhibits, and briefs of counsel.

Youngstown Sheet, a domestic corporation, in making its 1954 intercounty corporate return of taxable property, eliminated from the average value of its manufacturing inventories reported, certain inventories of property owned by it and held in various storage places in this state for storage only. The Tax Commissioner, in his final order now complained of, found these withheld inventories to be includable. The inclusion of these inventories within the average value of its manufacturing inventories reported, presents two of the three questions now made before this board on review. The third question has to do with the further inclusion of certain "engineering expense" within the tax base, which appellant contends is exempt from taxation.

We shall delay any further recitation of facts, and make note thereof in our consideration of the three respective errors complained of. The property of the taxpayer, withheld by it from the average value of its manufacturing inventories, and incorporated therein by the Tax Commissioner exclusive of "engineering expense", consists of iron ore at Lake Erie docks, iron ore, coal, scrap, limestone, fluor spar stored at company plants in Trumbull and Mahoning counties, held exclusively for future use, and finished seamless pipe held at its Mahoning plant for subsequent sale. Appellant says of this property, that:

> "Appellee erred in including, as taxable merchandise belonging to appellant and held for storage only in this state for the reason that like property belonging to a nonresident is excepted from taxation by Section 5701.08 of the Revised Code, and same section (and related sections), purporting to levy a tax on merchandise belonging to residents of this state and held for storage only, is, therefore unconstitutional and void in that it denies appellant the equal protection of the laws to which appellant is entitled under the Constitution of the State of Ohio and the Constitution of the United States."

Appellee, upon review, considered that this, being the property of a domestic corporation, was, under the statute, includable within the tax base, and since the question made was a constitutional one, and that he, as an administrative officer, was not empowered to consider the question of the constitutionality of a statute, and was bound to administer the statutory law as he found it. He had no other course but to do as he did, that is, include this property within appellant's average inventory base. The Board of Tax Appeals is likewise not invested with power to consider questions as to the constitutionality of a statute. Hence, it must follow that this board can do nothing more than

affirm the Tax Commissioner on this phase of his order in the respect complained of, which is accordingly done. If appellant has been unjustly discriminated against, that is a matter solely for a court of competent jurisdiction to determine.

Appellant in its brief in chief assumes that this board lacks jurisdiction to consider its question of inclusion of imports in its average taxable inventory because it presents a constitutional question. The Board of Tax Appeals does not subscribe to this view. True, the answer to this question is to be found in the federal Constitution and adjudications of the federal courts; but, as we see it, the board is not required to declare a state statute in conflict therewith and therefore unconstitutional. We do not believe that any pertinent state statute conflicts with Article I, Section 10, Clause 2 of the federal Constitution. Appellee briefs this issue in its answer brief.

Revised Code Section 5709.01 provides in part, that

> "All personal property located and used in business in this state, * * *, are subject to taxation, * * *."

Revised Code Section 5711.01, reads in part, that

> "(A) 'Taxable property' includes all the kinds of property, * * *, mentioned in sections 5709.01 and 5709.02 of the Revised Code, * * *."

Revised Code Section 5711.03, which provides for the listing of taxable property, contains this provision:

> "Except as provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts * * *."

These Code provisions appear to be the only sections thereof that could possibly be in conflict with the federal constitutional provision. We make the following observa-

tions. The General Assemblies of Ohio were unquestionably familiar with the constitutional provision. They legislated with that thought in mind. Note that Revised Code Section 5709.01 reads, "all personal property *located and used in business* in this state". Is this imported property located in Ohio? Had it on tax listing date become a part of the general mass of personal property in this state? These two questions must be answered in the negative unless the facts disclose that these ores were not then in the hands of the importer or had ceased to retain their import character. The federal laws and cases relating to interstate commerce, and particularly those provisions relating to taxation of goods in transit, closely parallel the rules of taxation governing imports. No one can successfully maintain that goods in transit in interstate commerce, or temporarily delayed within a state, may be locally taxed. Yet such goods are then at least temporarily located within a state. Clearly the words used in Revised Code Section 5709.01 were intended to embrace only goods that had permanently found location in Ohio, and that had become a part of the general mass of property in the state, and devoted to business therein.

As said in Orphans' Asylum v. Board of Tax Appeals, 150 O. S. 219, it is this board's mandatory duty to see to it that no taxable property escape taxation, and that no property entitled to exemption from taxation be unlawfully taxed. True that was said in a real property exemption matter, however, the same is equally true of personal property. The court held that this board had jurisdiction therein and should have exempted the property under the provisions of a prior statutory contract, and Trustees of Dartmouth College v. Woodward, 17 U. S. 518, 4 L. Ed. 629.

Any number of cases involving imports have been considered by both state and federal courts. The law as ex-

pounded by the federal courts is fairly well established. We shall seek to follow the interpretation by federal courts as it pertains to taxation of imports.

The second question presented by appellant has to do with a portion of appellant's property held in storage. This property consists of imported ores. During the year covered by its 1954 tax return it held the following average monthly imported ore inventory during 1953:

Grade	Imported From	Average Inventory Value
(1) Brazilian Ore	Brazil	$ 503,161.39
(2) Cuban Ore	Cuba	34,571.46
(3) Mexican Ore	Mexico	58,345.68
(4) Liberian Ore	Liberia	5,367.52
(5) Seine River Ore	Canada	791,786.82
	Total	$1,393,232.87

Appellant purchased and imported these 5 grades of ore, the first 4 grades for use in its open hearth furnaces, the fifth grade for use in its blast furnaces. This ore was not purchased for resale. It was loaded in bulk in foreign ports into chartered vessels which carried but a single cargo and a single grade of ore. When the vessels reached a port of entry the ore was discharged from the vessel into railroad cars and transported in bulk by rail from port of entry to Youngstown, Ohio. Upon arrival in Youngstown the railroad cars were spotted at one or more of appellant's storage yards and there unloaded into separate storage piles and held for subsequent use as needed. A separate storage pile is maintained for each grade of imported ore and such ore is not commingled or mixed with other property of the taxpayer. These stock piles of separate grades of ores are located some distance from stock bins and furnaces. When the need arises for ore of a particular grade

it is taken from the particular grade stock pile, transported to and placed in the stock bins. When a subsequent shipment of bulk ore of the same grade is received it is placed in that gratle's stock pile; that is, all imports of Brazilian ore were placed in the Brazilian stock pile, Cuban ore in the Cuban stock pile, Mexican ore in the Mexican stock pile, Liberian ore in the Liberian stock pile, and Seine River ore in the Seine River stock pile. Hence, a stock pile of a particular grade may be diminished by a day's need and augmented the next by subsequently imported ore of the same grade. At all stages these ores are loaded, imported, reloaded into railroad cars and unloaded into grade stock piles and then reloaded and taken to stock bins as needed in bulk. It sought at all times to have a three months' supply of all grades of imported ore on hand.

At this point we wish it to be distinctly understood that this issue is presented on an agreed stipulation of facts. It will be decided strictly upon those facts. Such facts as are hereinbefore stated are taken directly from the agreed stipulated facts.

The taxpayer concedes that these imported ores lose their immunity from state taxation when they are removed from storage piles and placed in the stock bins, but insists that so long as these ores remain in their separate stock piles the state may not tax these imports. Appellant grounds its claim on Article I, Section 10, Clause 2 of the Constitution of the United States and various causes decided thereunder. The constitutional provision provides as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The question made calls for determination of two issues of fact. First, was the appellant the importer of these bulk iron ores? Second, whether or not these bulk ores, when received in Youngstown and placed in stock piles of the particular grade set apart for each respective grade and not mixed with other ores of different grades, and ores were taken therefrom as needed, and like grade of ore was subsequently added thereto, lost their distinctive character as imports, and have become subject to the taxing power of the state of Ohio. If the first query be answered in the negative, the second query becomes immaterial.

The facts of this case, as to how and in what manner, this ore was purchased, delivery made and payment effected, hardly need further comment other than to say that they are in substance parallel with those found in Hooven & Allison Co. v. Evatt, 142 O. S. 235, which was reversed by the United States Supreme Caourt. See 324 U. S. 652, 89 L. Ed. 1252. The dissenting opinion of Judge Bell in the state report, and the opinion of Chief Justice Stone in the federal report, set forth at length the conclusion of fact and law applicable thereto more succinctly, perhaps, than this board could do. Appellant, from the contracts of purchase of these ores in evidence, clearly appears to have procured the importation of these ores, and even though channeled through brokerage firms, it accepted title to these ores when loaded on board ship at the foreign port of shipment. Appellant then made payment of the major portion of the purchase price. It caused and paid import duties and charges, marine insurance covering these cargoes and other transportation charges. The brokerage firms simply acted as agents and facilitating mediums through which these contracts of purchase and sale were effected. The buyer at all times appears to have been Youngstown Sheet and Tube. Upon the facts present we

do not consider that it can be successfully maintained that appellant was not the importer of these ores.

The second query presents a far more difficult question, and one which may, on completion of the Seaway Canal to the Great Lakes and importation of Labrador ore, be of vital interest to Ohio's courts and industry. Had these ores lost, by the manner of their handling, their import character? If we were here dealing with, let us say, sugar imported in bags, in cargo lots and stock piled in warehouse, the solution of the question would be simplified. Carrying the illustration further, if 5,000 bags of sugar were contained in one shipment and stored for subsequent use or sale in warehouse, and the next day 500 bags were removed therefrom for use or sale, and the day following a second cargo of 5,000 bags of like kind and quality was received and added to the stock pile, there would unquestionably remain in the original containers in the stock pile 9500 bags of imported sugar. In the present case we are dealing with an imported commodity that economically, commercially and practically, cannot be packaged, but must be purchased in bulk in boat cargo or railroad car lots. Unlike sugar, its bulk and indestructibility from weather economically requires and permits its storage in open air stock piles. If we adopt the figures above used in the sugar illustration and denominate the bags as tons, we have 9500 tons of iron ore of a particular grade and kind remaining in the particular stock pile.

The exceptional men who produced the constitution, and the particular provision drawn in question could readily visualize, or had already experienced, that certain commodities would be imported in bulk which were not susceptible of packaging. Hence, they generally provided that no state should lay imposts or duties on imports until that property had lost its import character. They did not

limit the provision's applicability to packaged imports. They knew that metals were extracted from bulky ores and that such would probably be imported. Since that period numerous other products, such as petroleum, oils, gasoline, bananas, lumber, guano, phosphate, limestone, and other commodities are now imported in bulk lots, due to a like inability to economically package them.

The earliest and still the leading case, on interpretation of the constitutional section in issue, is that of Brown v. Maryland, 25 U. S. 419, 6 L. Ed. 678, in which Chief Justice Marshall says:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In a later case, said to be the leading "original package" case, Low v. Austin, 80 U. S. (13 Wall.), 29, 20 L. Ed. 517, Justice Field makes these two observations:

> "Indeed goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State Government.
>
> "Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State."

From report of what are known as the "License Cases", Thurlow v. Mass., Fletcher v. R. I., Peirce v. N. H., 46

U. S. 504 (see 575), 12 L. Ed. 256, we learn that Chief Justice Taney argued for the state in Brown v. Maryland, supra, and that he thereafter sustained a change of mind. He therein concludes:

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as part of the mass of property in the State usually taxed for the support of the State Government."

Examination of numerous cases discloses that since decision of Brown v. Maryland, supra, and the "License Cases", there has been developed what is termed the "original package" theory. In Washington Chocolate v. King County, 21 Wash. (2d) 630, is found a well considered case in which many authorities are reviewed. Imports in this case were packaged articles. Its second syllabus succinctly sets up three situations developed by that theory:

> "Imported merchandise loses its constitutional immunity from state taxation,
>
> "(1) When it is no longer in the original package;
>
> "(2) When the importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state; and
>
> "(3) When it has been sold by the original importer to a purchaser, even though it remains in the original package."

We can find no fault with these conclusions. The question, however, which troubles us is: Whether or not imports in bulk, not susceptible of packaging, which constitute the entire cargo of the ship transporting the commodity to the port of entry, become subject to state taxation when unloaded from the ship. In answering this query, we have confined ourselves particularly to the only available reported decisions findable that had such bulk question squarely before them.

In Mexican Pet. Corp. v. City of S. Portland, 121 Me. 128, 115 Atl. 900, 26 A. L. R. 965, we find a case of bulk importation of oil decided upon the "original package" theory. Its syllabus holds:

> "Oil imported in tank steamers and pumped into receiving tanks belonging to the importer, for distribution by the owner of the tanks, has lost its character as an import and becomes subject to local taxation."

If this be a correct solution of that case, then by the same reasoning, the act of unloading any like bulk import is a severance of the import from the original package, which is the ship, and the import becomes a part of the general mass of property and loses its constitutional immunity the instant it is unloaded and enters the country. This is not true, however, under the original package theory if the commodity imported is packaged in containers. It does, therefore, appear, under the reasoning of the Maine case, that packaged imports are favored and have a preference over goods imported in bulk. We do not think that the constitutional inhibition made any such distinction. The court, in its next to the last paragraph of the Maine case, notes that at least two justices of the Supreme Court of New Jersey, in a nonreported case, under identical facts, are opposed to the Maine court's judgment.

Reverting to the case of Brown v. Maryland, supra, it must be noted that Chief Justice Marshall refrained from defining the term "original package", and went on to hold that goods "while remaining the property of the importer, in his warehouse, *in the original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." It is also again noted that Chief Justice Taney in "License

Cases", supra, drops out the word "package" and employs only the term "*the form and shape*" in which they, the goods, are brought into the country, Justice Field, in the leading "original package" case, Low v. Austin, supra, adopts Taney's exact wording.

Four more recent authorities which have to do with importation of bulk ship cargo imports strongly commend themselves to us. All four causes note the Maine case, supra, and disagree with its conclusion. In, re Taxes Pacific Guano & Fertilizer Co., 32 Hawaii, 431 (441), the Supreme Court of the Territory says and holds:

> "The phosphate rock was brought in ships in bulk. It could not have been stored in original packages, for it did not come in any package whatever. It would be an undue stretch of language to say that the ships were the original package. The test as to 'original packages' does not apply in such cases. The phosphate rock, within the decision in the Maryland case, was in the warehouse of this taxpayer in the 'original form' in which it was imported, that is, it was in bulk, it was being kept in the warehouse in bins separate from the general mass of property in this Territory."

The second case is that of Galveston v. Mexican Pet. Corp., 15 Fed. (2d) 208. The court's opinion states that

> "Oil brought from Mexico, not for general and indiscriminate sale, but to fill contract already made, retains its character as import not subject to local taxation, though some small quantities were sold locally, when pumped into tanks from steamers from which it was shipped."

The third case is that of Philippine Refining Corp. of N. Y. v. County of Contra Costa, 24 Cal. App. (2d) 665, its syllabus reads:

> "Where an importer of coconut oil from the Philippine Island, having a place of business in another state, conducts such business by aggregating orders sufficient

to fill a tank or tanks in a steamer and, upon arrival of the oil at the point of transshipment in this state, it is placed in temporary storage facilities, from which it is then taken and delivered, in the form in which it arrives, but in agreed quantities, to the buyers throughout the United States, pursuant to the orders theretofore made, and none of the oil in such storage facilities is held for indiscriminate sale, or for any purpose other than solely incidental to its transportation to the prior purchasers, said oil is not subject to local taxation, and local taxes paid thereon under protest may be recovered as being in violation of article I, sections 8 and 10, of the federal Constitution."

The fourth case is that of Mexican Petroleum Corp. v. Louisiana Tax Commission, 173 La. 604 (see 614), 138 So. 117. This case deals with Mexican crude oil imported in tankers. When it reached the port of entry, it was heated to make more ductile and pumped into land storage tanks. Of the state's right to tax this import, the court says and holds:

"It is obvious, under the authorities cited, and especially under Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095, that, because the oil came to a state of rest at Destrehan to be there refined, it did not lose its character as an import. A more important question concerns the manner of importation. Our appreciation of Brown v. Maryland, and the authorities cited, resting upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the manner of importation, it suffices that the import, to retain its character as such, remain in the original form in which imported. Some property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages. It was not the intention, however, to exclude such property from the immunities of imports. Of this nature is crude oil. The only practical way of importing it is in bulk. To import it in barrels would make the oil too costly to be used in general

commerce, whether for heating purposes, or for the manufacture of important articles of gasoline, kerosene, asphalt, or other products. It is obvious that to deprive such importations of their immunities as imports would be a blow to the great oil industry, and, as a result, to the people thereof. The import clause of the Constitution was not no intended or designed."

Another case of interest is that of Southern Pacific Co. v. City of Calexico, 288 Fed. 624 (642). Although it has to do with importation of baled Mexican cotton, which had to be recompressed before shipment to England, the court states that in such cases:

"The controlling question is: Was the property kept segregated from the general mass of property in the state in such a way that it could always be identified, and not subject to any beneficial use?" (Such as hypothecation, which the court had in mind.)

We think it well to make some comment on the case of Sonneborn v. Curetin, supra. This was an original package interstate commerce case, and not one of foreign bulk importation. It is here important for two reasons. Chief Justice Taft therein succinctly sets forth the reasons that lie behind the difference in the rule applicable in interstate commerce transactions from that of foreign importations, as they apply to goods in their original package. At page 1098 of the Law Ed. report appears the following further pronouncement:

"It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it."

The questions presented by appellant's second claim of error, that is, the matter of the taxability of bulk importations, have been previously inquired into by the old Tax

Commission and the Tax Commissioner of Ohio. In fact, the attorney general has twice been called upon for his opinion in such instances. See Attorney General's Opinions of 1928, Vol. 1, page 141, and of 1946, page 107. In the 1928 opinion the attorney general considered that flaxseed imported in bulk, for use by the importer in the manufacture of finished products, elevated from a ship's hold into large bins, from which the importer from time to time took sufficient flaxseed to supply its present needs as production required, lost its distinctive character as an import (the residue in bins) by reason of such withdrawals. In the second opinion a succeeding attorney general modifies his predecessor's views. We quote from the second opinion inasmuch as it raises the point here in issue which we think to be a vital point in this controversy.

"The importer should enjoy tax immunity for his imported goods so long as he retains them as undisturbed units. In Hooven & Allison Company v. Evatt, 324 U. S. 652, 89 L. Ed. Advance Opinions, 852, Mr. Chief Justice Stone in his opinion said:

"'Plainly if and when removed from the package in which they are imported, or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.

"'If the imports be packaged goods, the package is the unit which must remain unbroken and used. If they be unpackaged, then the rule should remain the same with respect to each unit. In the case of fungible goods shipped in bulk, the better rule would seem to be that we regard the entire quantity of each person's importation or any separated unit thereof as the unit that must not be divided, mingled or otherwise used if tax immunity is to be retained. The vital factor seems not to be the breaking of a package, but the breaking up of an imported unit, the mingling of the whole or any part thereof with domestic property, or the use of the whole or any part of a unit. Hooven & Allison Company v. Evatt, supra.

> "'If this test be applied to the 1928 Attorney General's Opinion, the conclusion reached therein is sustained, for the form of the import is changed by using parts of the imported units from time to time in manufacturing.'"

As we read the excerpt taken from the Hooven & Allison case, we remember that the court therein was considering packaged goods, and of course if a package was opened and a part of its contents was used for the purpose for which it was imported, the balance of the goods in that package lost its identity as an import; but we do not understand that Chief Justice Stone was saying that all other units or all other originally packaged goods in the import thereby lost their import identity. This manner of reasoning would lead to the inconsistent conclusion that if one bag of sugar in an import of 500 bags is sold or consumed, that the remaining 499 bags thereby become subject to state taxation because the unit import has been destroyed. To our notion this is a complete departure from the original package theory, and attempts to create a new yardstick in its stead, that of "breaking up of an imported unit". Certainly, it disregards the rule of Brown v. Maryland which still appears to be the law of the land. The bulk importer would have but one recourse. He must sell or consume his entire ship's cargo in a single transaction or one operation. This newly conceived theory has one advantage. It would permit state taxation of that which the constitutional provision prescribes shall not be taxed. It further strikes us that if the Maine case, supra, is rightly decided, it effects the very practice which induced adoption of the constitutional provision, and that which it sought to prohibit, to wit, the taxing of an import by the state having the port of entry within its border of imports destined for use and consumption in an interior state.

This practice was then a very live issue. See Federalist Papers and Madison's Notes.

The rule, as we understand it, is that as found in the second, eighth and tenth syllabi of Hooven & Allison Co. v. Evatt, supra:

> 2. "The prohibition in Article I, Sect. 10, Cl. 2, of the Federal Constitution of state imposts or duties on imports necessarily extended to state taxation of things imported after their arrival, so long as they retain the character of imports and have not become a part of the common mass of property within the state.
>
> 8. "A manufacturer's stock pile of imported materials, stored in the original packages in a warehouse at the factory pending use in the manufacturing process, retains the character of imports entitled to constitutional immunity from state taxation.
>
> 10. "Imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported, or when the original packages in which they were imported are broken."

We find no authority, dealing with importations in bulk, that approves of the Maine court's reasoning and conclusion save and except that of Tres Ritos Ranch Co. v. Abbott, 44 N. M. 556, 105 P. (2d) 1070, 130 A. L. R. 963, which is readily distinguishable upon the determining factors that the imported cattle were no longer in the same form and had been commingled with the general mass of property in the state. The court also found as a matter of fact that the Ranch Company was not the importer, which could easily have been dispositive of the appeal. Although the Maine court grounds its conclusion on the opinions of Marshall, Taney and Field, it rests squarely upon the hypothesis that there is but a single test in all cases, that

being the "original package" theory. It entirely disregards that portion of those opinions which speak of *"the original form or package"*. The Supreme Court of the United States has not as yet held that the "original package" theory is the one and only test whether the import be packaged or *in bulk*. We feel that the Maine court, in its zeal to see that no property of a taxable class within its borders shall escape state taxation, adopts the only theory upon which the questioned property could be locally assessed.

It was never intended that packaged imports should have a preference over bulk imports, and that the latter, because of their weights and quantities, were not within the constitutional prohibition. It is fairly obvious that it would be rather absurd to require an importer of goods to stock-pile each identical merchandise importation separately. If he received a hundred identical shipments must he then have a hundred separated places of storage for the same identical article? We think not. Because perishable goods require inside storage, it does not follow that bulky non-perishable imports must be stored inside or under cover. To do so in many instances would entail prohibitive expenditures. If one may remove 500 bags of stored imported sugar from a storage warehouse, it would not follow that the 4500 bags left in storage of a 5,000 bag importation would destroy the import character of the 4,500 identical bags left remaining in storage. Neither do we see how the remaining stored imported sugar's import character would be destroyed by augmenting the stock pile by a second importation of identical sugar. What is true of sugar is equally true of imported ore in bulk. There is no mixing of grades, kinds or quality. Its import identity is undisturbed. The quantity always present in the stock

pile is as susceptible of mathematical computation on a per ton basis as are the number of bags of sugar in the stock pile.

Appellee, in the course of his answer brief, refers to two cases, one of which is F. May & Co. v. City of New Orleans, 178 U. S. 496, 44 L. Ed. 1165. This case is one dealing with whether or not the box or container in which the foreign producer packaged the imports, or the individually packaged articles contained within the box or container, were the "original package" and when broken the separately packaged imports contained therein lost their import character.

The second case advanced is that of E. J. Stanton & Sons v. County of Los Angeles, 78 Cal. App. (2) 181, 177 Pac. (2) 804. This we have carefully examined as well as the same court's earlier case of Dant & Russell, Inc. v. Bd. of Sup'rs. of Los Angeles Co., 128 P. 2d, 389. It is difficult to harmonize these two decisions. We do note the following pronouncements made in the Dant-Russell case:

> "The law is settled that a state or a subdivision thereof may not constitutionally levy a tax upon a thing during the time it retains its character as an import and remains the property of an importer in a warehouse in the original form or package in which it was imported.
>
> "The case of Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 115 A. 900, 26 ALR 965, cited by respondent and apparently strenuously urged in the trial court, which reaches a contrary conclusion has been expressly disapproved as the law of this state. (See Philippine Ref. Corp. v. Contra Costa County, 24 Cal. App. 2d, 665, 669, 76 P. 2d, 163."

The Board of Tax Appeals, therefore, determines that the imported ores included by the Tax Commissioner

within the average monthly inventory base should not have been included therein. In so doing the commissioner erred.

* * * * * * * * * * * *

The constitutional issue of storage discrimination is affirmed for want of jurisdiction. The Tax Commissioner's order respecting the inclusion of imports in average monthly inventory values is reversed. The commissioner's order respecting engineering expense is affirmed.

APPENDIX III

YOUNGSTOWN SHEET & TUBE CO., APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

YOUNGSTOWN SHEET & TUBE CO., APPELLEE, *v.* BOWERS, TAX COMMR., APPELLANT.

1. If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, such protection cannot extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.
2. The word "drawings" as used in Section 5701.03, Revised Code, does not necessarily include specifications relating to drawings.
3. Even though the cost of drawings does not determine their true value for personal property tax assessment purposes, such cost is some evidence of such value at least at a time while the items to which such drawings relate are being constructed and before the completion of those items.

4. Where a substantial cost in preparing a substantial number of drawings is included in the book cost of certain construction projects and where such book cost of such construction projects is taken as the value of those projects for personal property taxation purposes without any deduction therefrom for the value of such drawings, the Tax Commissioner cannot avoid the provisions of Section 5701.03, Revised Code, relating to "drawings" merely by arguments that he is only taxing the construction projects and that the books of the taxpayer show everything that is taxed as allocated to the cost of those projects.
5. Where the record on appeal to the Board of Tax Appeals from an order of the Tax Commissioner contains substantial evidence supporting the claim of the taxpayer, the order of the commissioner, to be sustained, must be supported by something more than a mere presumption in its behalf. (Paragraph three of the syllabus of *Block v. Glander, Tax Commr.*, 151 Ohio St., 381, approved and followed.)

(Nos. 34868 and 34872—Decided January 30, 1957.)

Appeals from the Board of Tax Appeals.

The Youngstown Sheet & Tube Company, herein referred to as the taxpayer, is an Ohio corporation. In its 1954 return, it eliminated from the average value of its reported manufacturing inventories certain inventories of property owned by it and held in various storage places in Ohio. The Tax Commissioner in his final order found these withheld inventories to be taxable. Furthermore, the Tax Commissioner in that order made no deduction from the tax base of any amount on account of "drawings" which the taxpayer claimed to be exempt from taxation.

On appeal to the Board of Tax Appeals, that board affirmed the order of the Tax Commissioner so far as it related to the "drawings." With respect to the property held in storage, the taxpayer had contended that that provision of Section 5701.08, Revised Code, which, prior to

September 30, 1955, read, "but merchandise * * * belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only," should have stricken therefrom the words "belonging to a nonresident of this state" for the reason that those words made such provision unconstitutional and that such provision when so revised excepted such property from taxation. The Board of Tax Appeals determined that it had no power to determine that any part of Section 5701.08, Revised Code, was unconstitutional and that it was therefore bound to render its decision in accordance with the provisions of that statute as it found them.

The taxpayer further contended that certain iron ores imported by it from foreign countries were exempt from taxation by reason of the provisions of Clause 2 of Section 10 of Article I of the Constitution of the United States. This contention was sustained by the Board of Tax Appeals.

The cause is now before this court on appeals by the Tax Commissioner and by the taxpayer from the decision of the Board of Tax Appeals.

Mr. Carlton S. Dargusch, Sr. and *Mr. Jack H. Bertsch,* for appellant in case No. 34868 and appellee in case No. 34872.

Mr. C. William O'Neill, attorney general, *Mr. Larry Snyder* and *Mr. Kiehner Johnson,* for appellee in case No. 34868 and appellant in case No. 34872.

TAFT, J. For the reasons stated in *Allied Stores of Ohio, Inc., v. Bowers, Tax Commr., ante,* 116, the taxpayer's contentions with respect to property held in storage must be rejected, except to the extent that the property so held represented iron ores imported by the taxpayer from foreign countries.

As to such iron ores, the claim for tax exemption is based upon that provision of Clause 2 of Section 10 of Article I of the Constitution of the United States which reads:

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *."

That constitutional provision has been applied so as to prevent a state tax on property imported from outside the United States so long as it remains in the original package. *Hooven & Allison Co. v. Evatt, Tax Commr.*, 324 U. S., 652, 89 L. Ed., 1252, 65 S. Ct., 870; *Brown v. Maryland*, 12 Wheat., 419, 6 L. Ed., 678; *Low v. Austin*, 13 Wall., 29, 20 L. Ed., 517.

However, where the original package in which property was so imported has been broken, it has been held that the foregoing constitutional provision does not prevent imposition of a state tax upon the property which had previously been imported. *May v. New Orleans*, 178 U. S., 496, 44 L. Ed., 1165, 20 S. Ct., 976.

In the instant cases, it is not necessary to determine whether commodities, which are usually imported in bulk as is iron ore, may ever be exempt from state taxation by reason of that constitutional provision after such commodities have been taken from the ship or vessel that carried them to this country. Cf. *Mexican Petroleum Corp. v. City of South Portland*, 121 Me., 128, 115 A., 900, 26 A. L. R., 965, and *Tres Ritos Ranch Co. v. Abbott, Treas.*, 44 N. Mex., 556, 105 P. (2d), 1070, 130 A. L. R., 963, with *In re Taxes Pacific Guano & Fertilizer Co.*, 32 Hawaii, 431, and *Mexican Petroleum Corp. v. Louisiana Tax Commission*, 173 La., 604, 138 So., 117.

Although it does not appear that the Supreme Court of the United States has ever been called upon to determine

when fungible goods, such as iron ore, cease to be imports within the meaning of the foregoing constitutional provision (see annotation, 89 L. Ed., 1279, 1284 *et seq.*), that court has by its five to four decision in *May v. New Orlean, supra,* provided some guidance with respect to that problem. In that case, it was held that, where goods were packaged in small packages by a manufacturer and then packed in a larger package for shipment, such goods, although still in the unbroken smaller packages, were subject to state taxation as soon as the large shipping package had been broken.

In the opinion by Mr. Justice Harlan it is said:

"* * * the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the state, and bring them, while in their possession, within the range of local taxation.

"* * *

"* * * the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

In the instant cases, it appears from the agreed statement of facts that the taxpayer imported iron ores from five different countries; that these ores were purchased for use in the taxpayer's furnaces; that the taxpayer *maintained* a *supply* of each of these "ores *sufficient to meet* its *estimated requirements for* * * * *at least three months*"; that these ores were moved into a port of entry on vessels, each of which carried only one particular grade of ore; that, at the port of entry, the entire cargo of ore from a

particular vessel was discharged into railroad cars and transported in bulk to a *storage yard* in Youngstown, Ohio, *adjacent to the taxpayer's manufacturing facilities;* that there it was unloaded and placed in a separate storage pile in a separate area of the ore yard; that "a separate storage pile was maintained for each" of the five grades of imported ore and no such grade of ore was mingled with other ore or property "except that *different vessel shipments* of * * * ore" from a particular country *"were piled * * * on top of * * * other" ore* from that particular country *"as such* additional *shipments arrived";* and that "from time to time, *as needed, a portion* of the * * * ore *in each* separate *storage pile was removed* from such pile and transported to * * * stock bins" or "stock houses * * * for use in * * * furnaces * * * of the" taxpayer.

If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, we do not believe that such protection can extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.

If, as held in *May v. New Orleans, supra* (178 U. S., 496), goods still in their original manufacturer's package are taxable notwithstanding Clause 2 of Section 10 of Article I of the Constitution of the United States, if they were shipped in a larger package and the larger package has been broken, we cannot comprehend how a shipment of iron ore shipped and received in this country in one vessel can be regarded as nontaxable by reason of that constitutional provision (1) after it has been mixed with other ore re-

ceived from another vessel and (2) after part of such iron ore has been separated from the whole for use in manufacturing.

The taxpayer's complaint with respect to the failure of the Tax Commissioner to make any deduction from the tax base of any amount on account of "drawings" is based upon Section 5701.03, Revised Code, which, prior to October 4, 1955, read so far as pertinent:

"* * * 'personal property' includes every tangible thing which is the subject of ownership * * * other than patterns, jigs, dies, drawings * * *."

The taxpayer's evidence as to the value of "drawings" is largely evidence as to the cost of drawings *and specifications*. The evidence in the record does not require the conclusion as a matter of law that the specifications referred to in this evidence of cost were part of the drawings. Actually, there is much that would support a conclusion that, although related to the drawings, the specifications were not a part of the drawings; and the Board of Tax Appeals apparently reached that conclusion. The statute relied on does not use the word "specifications."

However, the evidence does show conclusively that there were a very substantial number of drawings. Also, there is evidence disclosing that both the cost of such things as some of the "tracings, blueprints and supplies" and also the charges for some of the "detail draftsmen and tracers" amounted to several thousands of dollars. Without suggesting that there is no other evidence as to value or cost of the drawings, we believe that anyone will concede that these items represented part of the cost of these drawings. Even though the cost of drawings does not determine their "true value" for tax assessment purposes (see Sections 5711.21 and 5711.18, Revised Code), such cost is some evidence of such value, at least at a time as here while the items to

which they relate are being constructed and before the completion of those items.

Notwithstanding the foregoing evidence as to the inclusion of a substantial cost in preparing a very substantial number of drawings in the book cost of the construction projects, which was taken as the value of those projects for taxation purposes, no deduction at all from that book cost was made for the value of "drawings." In such an instance, the Tax Commissioner cannot avoid the provisions of the statute relating to "drawings" by arguments that he is only taxing the construction projects and that the books of the taxpayer show everything that is taxed as allocated to the costs of those projects. Such arguments were rejected by this court in *Goodyear Aircraft Corp. v. Peck, Tax Commr.*, 162 Ohio St., 200, 122 N. E. (2d), 700.

As stated in paragraph three of the syllabus of *Bloch v. Glander, Tax Commr.*, 151 Ohio St., 381, 86 N. E. (2d), 318:

"Where the record on appeal to the Board of Tax Appeals from an order of the Tax Commissioner contains substantial evidence supporting the claim of the appellant, the order of the commissioner, to be sustained, must be supported by something more than a mere presumption in its behalf."

It follows that as to case No. 34872 the decision must be reversed and that as to case No. 34868 it must be affirmed except to the extent that it relates to the claimed deduction from the tax base on account of "drawings," and the cause is remanded to the Board of Tax Appeals for further proceedings.

Judgments accordingly.

Weygandt, C. J., Zimmerman, Bell, Matthias and Herbert, JJ., concur.

Stewart, J., concurs except as to that portion of paragraph one of the syllabus between "(1)" and "(2)."

ALLIED STORES OF OHIO, INC., APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

(No. 34926—Decided January 30, 1957.)

Appeal from the Court of Appeals for Cuyahoga County.

Allied Store of Ohio, Inc., herein referred to as the taxpayer, is an Ohio corporation. In an appeal to the Board of Tax Appeals from a final order of the Tax Commissioner, the taxpayer contended that the Tax Commissioner had erroneously assessed for taxation for the year 1954 certain "merchandise * * * held in a storage warehouse for storage only" within the meaning of those words as used in Section 5701.08, Revised Code, in effect prior to September 30, 1955, and that the statutes of Ohio were unconstitutional to the extent that they purported to levy a tax on such property not "belonging to a nonresident of" Ohio, in that they denied a resident such as the taxpayer the protection of the laws equal to that enjoyed by a nonresident. See *Little v. Smith, Atty. Genl.*, 124 Kan., 237, 257 P., 959, 57 A. L. R., 100; *Colgate v. Harvey*, 297 U. S., 404.

Section 5709.01, Revised Code, reads so far as pertinent:

"* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof."

Section 5701.08, Revised Code, prior to September 30, 1955, read so far as pertinent:

"(A) Personal property is 'used' within the meaning of 'used in business' * * * when acquired or held as means or instruments for carrying on the business * * * or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is [are] not used in business in this state if held in a storage warehouse for storage only."

In its final entry, the Board of Tax Appeals stated in part:

"The only real point of difference between the present case and that of the *Goodrich case* * * * [161 Ohio St., 202, 118 N. E. (2d), 525] lies in that appellant is a domestic, or an Ohio corporation, engaged exclusively in merchandising, while the Goodrich company is a nonresident manufacturing corporation. * * *

"Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 * * *, matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made * * *."

In affirming the decision of the Board of Tax Appeals, the Court of Appeals stated in part:

"The positive statement in Section 5701.08, Revised Code, that 'products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only' is not an arbitrary or artificial classification and is within the right and power of the Legislature to declare. See *City of Xenia v. Schmidt*, 101 Ohio St., 437 [130 N. E., 24]; *Travelers'*

Ins. Co. v. Connecticut, 185 U. S., 364. *Goodrich Co. v. Peck*, 161 Ohio St., 202 [118 N. E. (2d), 525], in effect so holds."

The cause is now before this court on appeal from the judgment of the Court of Appeals as a case involving a debatable constitutional question and pursuant to allowance of a motion to certify the record.

Mr. Carlton S. Dargusch, Sr., and *Mr. Jack H. Bertsch*, for appellant.

Mr. C. William O'Neill, attorney general, *Mr. Larry Snyder* and *Mr. Kiehner Johnson*, for appellee.

TAFT, J. Ordinarily, a constitutional question will not be considered unless it is necessary to consider such constitutional question in deciding the case before the court. In our opinion, it is not necessary to consider the constitutional question raised by the taxpayer in the instant case because, if its contention with regard to that question is sound, it necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, "but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only," was void and should be stricken. That being so, it is apparent that any of taxpayer's "merchandise * * * held in a storage warehouse for storage only" would be taxable because described by the preceding words remaining in the statute and reading, "stored * * * as * * * merchandise."

Of course, if only that portion of the proviso after the semicolon in subdivision (A) of Section 5701.08, which read, "belonging to a nonresident of this state," is stricken, the discrimination between residents and nonresidents would be eliminated; and then the proviso would

prevent taxation of the taxpayer's "merchandise • • • held in a storage warehouse for storage only." However, the question remains as to the power of this court to effect that result by striking only that portion of the proviso. In other words, if we assume that the taxpayer's contention that the discrimination beween nonresidents and residents contemplated by the words of the proviso would deny a resident the equal protection of the laws and must be eliminated, has this court the power to eliminate that discrimination by striking only that portion of the proviso reading, "belonging to a nonresident of this state"? If it does not have that power, the whole proviso must be stricken in order to eliminate that discrimination and then the taxpayer would obviously have nothing upon which to base its claim for the relief which it seeks.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

In the opinion by Welch, J., in *State, ex rel. McNeal, v. Dombaugh, Clerk*, 20 Ohio St., 167, 174, it is said:

"It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part of the act. The *meaning* of the Legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law."

In *State, ex rel. Wilmot, v. Buckley*, 60 Ohio St., 273, 296, 54 N. E., 272, it is said in the opinion by Burket, J.:

"* * * the court has no lawmaking power, and cannot extend a statute over territory from which it is excluded by the General Assembly. A court can hold a whole act unconstitutional because it is not broad enough * * *; but it cannot extend an act which is too narrow, so as to take in territory which was left out by the General Assembly."

In 11 American Jurisprudence, 855, Section 161, it is said:

"One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."

See also *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, 46 L. Ed., 679, 22 S. Ct., 431; *State, ex rel. Wilson, Solr., v. Lewis, Aud.*, 74 Ohio St., 403, 78 N. E., 523; *State, ex rel. Squire, Supt. of Banks, v. City of Cleveland*, 150 Ohio St., 303, 336, 82 N. E. (2d), 709; *State, ex rel. English, v. Industrial Commission*, 160 Ohio St., 215, 217 *et seq.*, 115 N. E. (2d), 395; but see *State, ex rel., v. Baker*, 55 Ohio St., 1, 44 N. E., 516.

In the instant case, we do not have a legislative situation where the proviso was merely enacted as a part of a statute defining the objects to be subject to taxation. In such an instance, striking the words "belonging to a nonresident of this state" would merely prevent the tax from being extended as far as the General Assembly intended. By doing that, this court would not be extending the operation

of the statute so as to cover subjects or objects that the General Assembly did not intend to cover.

However, in the instant case, these taxing statutes, as originally enacted in 1931 (114 Ohio Laws, 714), did not contain the proviso which the taxpayer must necessarily rely upon for any relief *after* it has had this court remove from it the portion which it contends was invalid. The proviso was added by an amendment to the statute in 1933 (115 Ohio Laws, 548). See annotation, 66 A. L. R., 1483. Cf. *Frost v. Corporation Commission of Oklahoma*, 278 U. S., 515, 525, 73 L. Ed., 483, 49 S. Ct., 235; *Reitz v. Mealey, Commr.*, 314 U. S. 33, 38, 39, 86 L. Ed., 21, 62 S. Ct., 24; 11 American Jurisprudence, 841, 856, 857, Sections 154, 161. Prior to that amendment, the General Assembly had expressed an intention to tax any property "when stored or kept on hand as * * * merchandise." The amendment dealt with a withdrawal of some of that property from such taxation. The General Assembly provided only for withdrawal of "merchandise or agricultural products belonging to a nonresident," It did not provide for anything with respect to such merchandise or agricultural products belonging to a resident. If this court merely strikes the words "belonging to a nonresident of this state," the effect of that would be to provide for such a withdrawal of "merchandise or agricultural products" belonging to a resident; and it would thereby be substantially *extending* the operation of the legislative enactment beyond the scope contemplated by the legislative language. As the taxpayer recognizes in its reply brief, its contention is that "the *failure* of the Legislature *to extend* the exception to residents is" what was unconstitutional. By merely striking the words "belonging to a nonresident of this state," this court in effect would be exercising a legislative power which it does not have.

Therefore, if we assume that the proviso was unconstitutional and invalid because it denied to residents a protection of the laws equal to that enjoyed by nonresidents, it would be necessary to strike the whole proviso to eliminate that invalidity. If that is done, the taxpayer would not be entitled to any relief. It follows that the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

Stewart, Bell, Matthias and Herbert, JJ., concur.

Weygandt, C. J., and Zimmerman, J., concur in the judgment.

APPENDIX IV

Section 5701.08, Revised Code of Ohio.

As used in Title LVII of the Revised Code:

(A) Personal property is "used" within the meaning of "used in business" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only. Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are "used" when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

(B) "Business" includes all enterprises conducted for gain, profit, or income and extends to personal service occupations.

Section 5709.01, Revised Code of Ohio.

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property.

Section 5711.01, Revised Code of Ohio.

As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

(A) "Taxable property" includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code, and also the amount of value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits

as are taxable at the source as provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code, nor surrender values under policies of insurance.

Section 5711.03, Revised Code of Ohio.

Except as provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts as of the beginning of the first day of January, annually, except that deposits not taxed at the source shall be listed as of the day fixed by the board of tax appeals for the listing of deposits taxed at the source pursuant to Section 5725.05 of the Revised Code. The subsequent transfer of any taxable property shall not authorize any taxpayer to omit the same from his return nor the assessor to fail to assess the same in the manner required, although such return or assessment is not made until after such transfer. When a person becomes a taxpayer between the first day of January and the first day of July, in any year, he shall list all his taxable property as to ownership and taxing districts as of the date when he becomes such taxpayer, and as to valuation as of the next preceding first day of January, unless he shows to the assessor, under oath, and by producing a copy of the return or assessment, that the same property has been listed or assessed for taxation in that year in this or another state or country, or that such property has been received by him in exchange for property so assessed; but a person engaging in business between the first day of January and the first day of July in any year shall list the probable average amount of personal property intended to be used in business by him until the first day of January next thereafter.

APPENDIX V

THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

THE YOUNGSTOWN SHEET AND TUBE COMPANY, APPELLANT, v. STANLEY J. BOWERS, TAX COMMISSIONER, STATE OF OHIO, APPELLEE.

No. 28439

Stipulation of Facts

It is stipulated and agreed by and between counsel for the respective parties hereto that the following stipulation may be considered as the facts for all purposes pertinent to the consideration and decision of the above case, subject, however, to the right of either party to offer additional evidence concerning engineering expenditures including the value of drawings, specifications and other detail incident thereto.

1. The Youngstown Sheet and Tube Company, appellant herein, is a corporation organized and existing under and by virtue of the laws of the state of Ohio, with its principal office located in the Stambaugh Building, Youngstown, Ohio, and with plants for the manufacture of iron and steel (including products) in Mahoning and Trumbull counties, Ohio. Exhibits A and B attached hereto and made a part hereof.

2. The tax year in question is the year 1954, and the property covered thereby was listed as of January 1, 1954, except inventory, which was averaged on a twelve months basis for the calendar year 1953.

4. There was included by appellee, as taxable, for the year 1954 iron ores of a value of $1,393,232, which had been imported by appellant from foreign countries, namely, Brazil, Cuba, Mexico, Liberia, and Canada. Exhibit D attached hereto and made a part hereof. Said imported ores were kept adjacent to appellant's manufacturing facilities in a structure having two parallel walls, and on which there was located a movable ore bridge. (Exhibits A and B supra).

The Brazilian, Cuban, Mexican, and Liberian ores were purchased for ultimate use in appellant's open hearth furnaces, and the Seine River ore was purchased for ultimate use in appellant's blast furnaces. The Brazilian, Cuban, Mexican, and Liberian ores were transported by ocean vessels to the port of entry into this country, which was either Baltimore or Philadelphia. In the movement of these ores a steamship was chartered for each movement which involved only a single and particular grade of ore. The imported ore was loaded into the vessel at the foreign port and transported in bulk by such vessel to the port of entry. At the port of entry the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk by rail from the port of entry to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to the appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard where it was held for ultimate use in the open hearth furnaces of appellant.

The importation of the Seine River ore (a single and particular grade of ore) involved a lake vessel movement from a Canadian port to Cleveland, Ohio. The imported ore

was transported by vessel in bulk to the port of entry (Cleveland, Ohio). At Cleveland, Ohio the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk from Cleveland by rail to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard, where it was held for ultimate use in the blast furnaces of appellant.

A separate storage pile was maintained for each grade of imported ore, i.e. Brazilian, Cuban, Mexican, Liberian and Seine River, and such particular grade of imported ore was not commingled with other ore or property of the appellant except that different vessel shipments of identical ore were piled one on top of the other as such additional shipments arrived (i.e. Brazilian on Brazilian, Cuban on Cuban, Mexican on Mexican, Liberian on Liberian, and Canadian on Canadian).

From time to time, as needed, a portion of the imported ore in each separate storage pile was removed from such pile and transported to the stock bins in the case of the blast furnaces and stock houses in the case of the open hearth furnaces for use in said blast furnaces and open hearth furnaces of the appellant. Exhibits A and B supra.

Appellant maintained a supply of imported ores sufficient to meet its estimated requirements for a period of at least three months.

5. There was included by appellee, as taxable, for the year 1954 certain tangible personal property, consisting of raw materials and finished seamless pipe, as set forth in Exhibit E, attached hereto and made a part thereof.

Said tangible personal property consisted of:

(a) Iron ore, produced in the United States and stored (in a rectangular structure having four walls and on two walls of which there was located a movable ore bridge) on Lake Erie public docks at Ashtabula, Ashtabula county, and Bedford, Cuyahoga county, and held for ultimate use in manufacturing. The Lake Erie public docks at Bedford (Cuyahoga county) were owned, controlled and operated by the Erie Dock Company, and the Lake Erie public docks at Ashtabula (Ashtabula county) were owned, controlled and operated by the Ashtabula and Buffalo Dock Co.

(b) Raw materials consisting of iron ore, coal, scrap, limestone, fluor spar, ferros and additions stored adjacent to appellant's manufacturing facilities in Trumbull and Mahoning counties and held for ultimate use in manufacturing by appellant. The domestic iron ore at appellant's manufacturing facilities was stored in the same manner and in the same type of structure as the imported ore. The appellant's properties in Trumbull and Mahoning counties were enclosed by wire fences and other enclosures.

(c) Finished seamless pipe manufactured in Ohio and stored in the pipe storage yard adjacent to appellant's manufacturing facilities in Mahoning county and held for ultimate sale by appellant.

With the exception of the iron ore stored on Lake Erie public docks, all inventories were located on properties of appellant and were under its control at all times. Exhibits A and B supra.

The raw materials, consisting of domestic and imported iron ore, coal, scrap, limestone, fluor spar, ferros and additions, were in saleable form, as was the finished seamless pipe. Said raw materials were not held by appellant for resale but were held by the appellant for use in manufacturing. The finished seamless pipe was held for ultimate sale by appellant.

6. The assessments made by the Tax Commissioner by preliminary assessment certificate, dated August 23, 1954, by amended preliminary assessment certificate, dated August 30, 1954, and as determined in the journal entry, dated March 2, 1954, were as set forth on the "Summary of valuations by taxing district". Exhibit F attached hereto and made a part hereof.

7. As used herein, the words, "imported" or "importation", shall not be deemed to be dispositive of the question in issue as to whether the subject ores imported from Brazil, Cuba, Mexico, Liberia, or Canada retained their characteristics as imports immune from state taxation where said ores had been commingled in the ore yards of appellant with ores of the same kind (i.e. Brazilian with Brazilian, Cuban with Cuban, Mexican with Mexican, Liberian with Liberian, and Canadian with Canadian) from other separate vessel shipments and where a portion of such commingled ores had been withdrawn for use in the blast or open hearth furnaces of appellant.

8. All values, as set forth in Exhibits C to E, inclusive, are book values taken from appellant's books.

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Attorneys for Tax Commissioner of Ohio.
Carlton S. Dargusch, Sr.,
Attorney for The Youngstown Sheet and Tube Company.

(NOTE: *The exhibits and unrelated material have been omitted.*)

APPENDIX VI

SUPREME COURT OF OHIO

YOUNGSTOWN SHEET AND TUBE COMPANY, APPELLANT, v. STANLEY J. BOWERS, TAX COMMISSIONER, STATE OF OHIO, APPELLEE.

Certificate

On motion of appellant, Youngstown Sheet and Tube Co., the court orders it to be certified and made a part of the record of the proceeding and of the judgment in this cause that the Tax Commissioner, by his appeal to this court from the Board of Tax Appeals of Ohio, placed in issue the constitutionality of Sections 5711.03, 5701.08, 5709.01, and 5711.01 of the Ohio Revised Code, as to whether appellant's iron ore imports were taxable under those sections, or protected therefrom by Article I, Section 10, Clause 2 of the United States Constitution as imports; that this court, pursuant to appeal, and upon the record, briefs of counsel and oral argument, reversed the Board of Tax Appeals of Ohio, which had held that appellant's iron ore imports were protected from the application of the above sections, and in turn held that the sections did tax appellant's iron ore imports; that upon consideration of the same, the court was of the opinion and accordingly decided, that the said statutes were not invalid by reason of taxing appellant's iron ore imports and were not repugnant to the United States Constitution in so taxing; and that a determination of that question was appropriate and necessary to a decision in this case.

Witness the Honorable Supreme Court of Ohio, this twentieth day of May, 1957.

Supreme Court of Ohio
Carl V. Weygandt,
Chief Justice of the Supreme Court of Ohio.

Certificate

On motion of the appellant, Youngstown Sheet and Tube Co., it is ordered to be certified and made a part of the record of the proceeding and of the judgment of the court in the cause that by its appeal from the Board of Tax Appeals, the appellant placed in issue the constitutionality of former Section 5701.08, Revised Code of Ohio, contending that the said section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations while excepting the same property of non-resident corporations, and that the court found, pursuant to appeal, briefs and oral argument of counsel, (and by its decision in Allied Stores of Ohio, Inc. v. Bowers, 166 O. S. 116) that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the section to include appellant within the exception; that therefore the section must stand; that so standing and so construed the section was not repugnant to the United States Constitution or if repugnant, had nevertheless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the court's decision.

Witness the Honorable Supreme Court of Ohio, this twentieth day of May, 1957.

Supreme Court of Ohio,
Carl V. Weygandt,
Chief Justice of the Supreme Court of Ohio.